No. 06-1539

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In The Supreme Court of the United States

MICHAEL and MELISSA MARKOVICH,
Parents of Ashlyn M. Markovich,

Petitioner,

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. What standard should be applied in determining the time certain for the commencement of the statute of limitations in which to bring a claim pursuant to the National Vaccine Compensation Act.

2. Whether, in the case at hand, a two month old acting as though she's tired later in the day of receiving her vaccination is enough to trigger the commencement of the statute of limitations.

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OPINION BELOW

The United States Court of Appeals, Federal Circuit, published its decision reported at 477 F.3d 1353 (App., *infra*., 1-17). Mr. and Mrs. Markovich appealed from a final decision of the United States Court of Federal Claims, Susan G. Braden, J., 69 Fed. Cl. 327 (App., *infra*, 18-42). Finally, the decision of Special Master Sweeney, No. 03-2015V, is attached (App., *infra*, 43-87).

JURISDICTION

The United States Court of Appeals for the Federal Circuit filed its decision and judgment was entered on February 20, 2007. This court has jurisdiction under 28 U.S.C. § 1254(1) to review the Federal Circuit Court's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

The National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-1 *et seq.* (2000 & Supp. II 2003), provides in pertinent part:

> §§ 300aa-1 to 300aa-34 (2000 & Supp. II 2003), "Vaccine Act" expressly provides that for vaccines listed in the Vaccine Injury Table ("table"): If a vaccine-related injury occurred as a result of the administration of such vaccine, no Petition may be filed for compensation under their program for such injury after the expiration of 36 months after

> the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury... 42 U.S.C. § 300aa-16(a)(2) (emphasis added).

STATEMENT OF THE CASE

1. Cases under the Vaccine Act are adjudicated in the first instance by a Special Master. 42 U.S.C. § 300aa-12(d)(3) (Supp. IV 2003). On motion by party, the Court of Federal Claims will review the Special Master's decision. That court may either uphold the decision, or "set aside any findings of fact or conclusions of law***found to be arbitrary, capricious and abusive discretion, or otherwise not in accordance with law and issue its own findings of fact and conclusions of law." 42 U.S.C. § 300aa-12(3)(2)(B) (Supp. IV 2003). The decision of the Court of Federal Claims is subject to review in the United States Court of Appeals for the Federal Circuit. 42 U.S.C. § 300aa-12(f) (Supp. V 2003).

2. On July 10, 2000, when Ashlyn Markovich was approximately two months old, she received a series of vaccinations, including the vaccinations against diphtheria, tetanus (commonly known as lock jaw), pertussis (whopping cough), polio and Haemophilus Influenza Type B. That same day, the Markovichs observed Ashlyn having an eye blinking episode to which they thought she was simply tired. App., *infra*, 3. For approximately the next 50 days, the Markovichs went on with their life with no concerns for Ashlyn's health. There were

occasional episodes in which the Markovichs thought Ashlyn was tired because of the blinking of her eyes. *Id.* However, on August 30, 2000, Ashlyn became unresponsive for approximately 20 minutes, during which time all of her extremities jerked aggressively. The Markovichs immediately called 911 and Ashlyn was taken to the Fairview Ridge Emergency Room, where she was diagnosed with having suffered a grand-mall seizure. *Id.* Another seizure occurred about two weeks later. Ashyln continued to suffer seizures almost daily, sometimes experiencing 3 or more seizures a day. At times, Ashlyn had seizures that consisted of eye blinking episodes between 150 and 500 times per day through the year 2000. *Id.* at 4.

On January 29, 2002, Ashlyn was admitted to the Mayo Clinic for an evaluation at which time a neurologist diagnosed Ashlyn as having experienced "four types of seizures: (1) repeated eye blinking; (2) clonic movement of the face, arm and leg; (3) generalized seizures with or without focal onset; and (4) partial motor seizures." *Id.*

4. On August 29, 2003, the Markovichs filed a petition for compensation under the Act, alleging that Ashlyn suffered the seizures as a result of her vaccination on July 10, 2000. *Id.* On January 27, 2004, the Special Master held a status conference indicating that an "onset hearing" was necessary in order to determine whether the Markovichs' Petition was time-barred as having been filed more than three years after the date on which the first symptom or manifestation of onset of the injury occurred. On November 5, 2004, the Special Master

held the onset hearing to determine whether the onset of the seizures occurred on July 10, 2000 or on August 30, 2000. *Id.* at 5.

5. On July 22, 2005, the Special Master denied compensation. *Id.* The Special Master was persuaded by the testimony of Petitioners' own expert, Dr. Jean-Ronel Corbier. "Throughout his testimony, Dr. Corbier stated that Ashlyn's eye blinking would have made him suspicious and prompted him to ask further questions and conduct an evaluation and order testing." App., *infra*, 75. The Special Master concluded that Dr. Corbier's testimony proved that from an objective standpoint, onset was manifest even though the parents did not recognize its significance. *Id.* at 77. Further, the Special Master concluded that because the parents were aware that eye blinking episodes began on July 10, 2000, regardless of whether they thought there was an injury of any type, and continued until the August 30, 2000 seizure was relevant. *Id.* at 73.

6. The United States Court of Federal Claims agreed with the Special Master's decision and denied Petitioners' Motion for Review claiming that the onset of Ashlyn's seizure disorder was July 10, 2000. Again, the Court of Federal Claims was persuaded by Dr. Corbier's testimony. The court put great weight on Dr. Corbier's testimony that Ashlyn's July 10, 2000 eye blinking episode was a result of a cerebral dysfunction and is "linked to" the August 30, 2000 episode. App., *infra*, 32. Further, Dr. Corbier testified that the July 10, 2000 episode was due to some type of cerebral dysfunction... *Id.* at 32-33. Finally, Dr. Corbier testified that Ashlyn's

July 10, 2000 eye blinking episode was an "objective symptom" of a seizure disorder. *Id.* at 33. For the above reasons, the Court of Federal Claims determined that the Special Master's finding that the date of the onset was July 10, 2000 was not arbitrary or capricious.

7. The United States Court of Appeals, Federal Circuit, held that the eye blinking episode of July 10, 2000 constituted the first symptom of the seizure disorder, and was sufficient to trigger the running of the three-year limitations under the Vaccine Injury Act. App., *infra*, 1. The Court of Appeals held that:

> **the first symptom or manifestation of onset, for purposes of § 300aa-16(a)(2), is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large.**

Id. at 16.

The Court of Appeals based its holding on the following:

- Dr. Corbier's testimony that the eye blinking episode of July 10, 2000 was objective evidence of the first symptom of Ashlyn's injury. *Id.*
- Mayo Clinic report of January 29, 2002 that referenced eye blinking as a type of seizure activity. *Id.* at 14.

- A medical record of September 20, 2001 with reference to eye blinking being a sign of seizure disorder. *Id.*
- The Markovichs filed their Petition on August 29, 2003, more than 36 months after the initial symptoms. *Id.* at 16.

REASONS FOR GRANTING THE PETITION

THIS COURT MUST ESTABLISH A MORE DEFINITIVE AND EQUITABLE MANNER OF DETERMINING THE TIME CERTAIN FOR THE COMMENCEMENT OF THE STATUTE OF LIMITATIONS IN CLAIMS BROUGHT PURSUANT TO THE NATIONAL CHILDHOOD VACCINE INJURY ACT.

In claims brought pursuant to the Vaccine Act, the statute of limitations begins to run from the date of the first symptom or manifestation of onset of the alleged vaccine injury. 42 U.S.C. § 300aa-16(a)(2). The Court of Appeals found that the 36 months in which to bring a claim started the day that Ashlyn Markovich received her first vaccination (July 10, 2000). The event that triggered it was an event that her parents thought was a sign of their daughter being tired. There is no reasonable basis for the standard to require the commencement of the statute of limitations to be an event that reasonable parents considered to be normal childhood activity. On July 10, 2000, Ashlyn Markovich, then two months old, was blinking her eyes and her parents thought she was tired. The incident was completely uneventful, short in duration and meaningless. The

only evidence of Ashlyn Markovich's injury or condition as of July 10, 2000 was that she was tired. Showing signs of sleepiness or tiredness on one occasion for a minimal period of time should not be a sufficient to bar an injured vaccine recipient from filing a claim.

For this court to deny Petitioners' Writ of Certiorari would ultimately result in an absurd result. The previous courts have endorsed the proposition that "symptom or manifestation of onset" in seizure disorder cases occur when a parent observes such common everyday events as their child blinking his or her eyes without anything else. A two month old child who is blinking her eyes could as easily be showing signs of being tired as showing a symptom of a disease or injury. The blinking of eyes alone should not be the type of behavior that is considered to clearly or obviously signal the onset of a seizure disorder.

It is common knowledge that a two month old blinking her eyes could be a sign of Ashlyn having something in her eye, batting her eyelashes or simply being tired. As testified to by Petitioners' expert, Dr. Jean-Ronel Corbier, eye blinking alone is not a symptom of anything, without any other symptom, of an injury. App., *infra*, 114.

Parents of immunized children are getting their children immunized to protect their children. The number of children who are adversely affected by the immunization are minuscule when compared to the number of children benefiting from immunizations. There is nothing about the

immunization process that would put a reasonable parent on notice that they should be suspect of side affects, especially epilepsy. There is nothing about the immunization process to warn parents that if their two month old child looks as though she is tired the day of her immunization that it may be the start of epilepsy or seizure disorder. However, the Court of Appeals' decision supports the absurd result that the Vaccine Act's three year statute of limitations begins to run upon an act occurring which was reasonably interpreted by Mr. and Mrs. Markovich to be a sign that their daughter was tired.

Mr. and Mrs. Markovich are not contending that there must be evidence of an injury caused by or related to the vaccination or that there must be a medical diagnosis before the statute of limitations is triggered. However, Congress could not have intended that one, simple, uneventful activity, as common as a baby smiling, is enough to trigger the running of the statute of limitations.

CURRENTLY, AS THE LAW EXISTS, A CHILD THAT DEVELOPS AUTISM FROM VACCINATIONS HAS A DIFFERENT STANDARD TO USE IN CALCULATING THE COMMENCEMENT OF THE STATUTE OF LIMITATIONS THAN A CHILD WITH A SEIZURE DISORDER.

The laws of this country are to apply equally to all parties. However, in light of *Setnes* and the holding of the Court of Appeals in this case, there are currently two standards that are applied to calculate the start of the statute of limitations in

vaccine injury cases. For that reason alone, a standard that is definite and equitable must be established.

Previously, the United States Court of Appeals for the Federal Circuit has held that the statute of limitations in vaccine act cases "begins to run upon the first symptom or manifestation of the onset of injury, even if the Petitioner reasonably would not have known at the time that the vaccine has caused an injury." *Brice v. Sec'y of Health & Human Servs.*, 240 F.3d 1367, 1373 (Fed. Cir. 2001); *Goetz v. Sec'y of Health & Human Servs.*, 45 Fed. Cl. 340, 341 (1999). Congress may have intended the cause of action in vaccine injury table cases to accrue upon occurrence of the first symptom of an injury. However, Congress could certainly not have intended that a cause of action accrues upon an insignificant and/or a normal everyday event interpreted by reasonable parents to be that of a sleepy two month old child.

In *Setnes*, the court addressed the issue of what to do when "symptoms" are subtle or confused with typical child behavior. Although the *Setnes* court involved autism the court held that, where there is no clear start to the injury, prudence mandates that a court addressing the statute of limitations not hinge it decision on the "occurrence of the first symptom." *Setnes v. U.S.*, 57 Fed. Cl. 175, 179 (2003).

The *Setnes* child received his 15-month vaccination on September 11, 1998. After the immunizations, his mother noted that the child

started making a constant humming noise. The *Setnes* child was doing a lot of babbling and, because he was slow to develop words and would no longer respond when he was called his name, his parents thought of a hearing problem. *Setnes*, 57 Fed. Cl. at 175. Later in the same month of the immunization, the child started having temper tantrums, would kick and scream and was at times unconsoleable. The parents then began to notice him running around the kitchen table and would stare at the edge of the table or counter. Finally, the parents began to notice that their son was eating the cardboard boxes that held videotapes. *Id.* at 177.

The *Setnes* parents met with the pediatrician and the pediatrician expressed concern that their child's impediments may be the result of pervasive developmental disorder. On July 15, 2002, the Setnes' filed their Petition. Ultimately, the Petition was allowed because the *Setnes* court ruled that all of the above stated activities were not significant enough to trigger the running of the statute of limitations. The *Setnes* court, because of the difficulty in separating normal childhood activities from symptoms or signs of autism, established an onset date based on contemporaneous medical evaluations as opposed to hindsight. *Id.* at 181.

The *Setnes* court determined that humming, screaming, kicking, babbling and eating videotape cardboard boxes was behavior not recognizable as a sign of a vaccine injury by the medical profession at large. *Id.* The *Setnes* court was not persuaded that the above described behavior clearly or obviously signals the onset of autism. *Id.*

In *Setnes*, the mother was aware that these activities such as humming, screaming, kicking, etc., were not normal childhood activities. For these reasons, she was taking her child to various doctors and the doctors were unable to link the events to an injury and certainly did not link it to a vaccine injury.

However, in the case at hand, the event was so insignificant to Mr. and Mrs. Markovich that they did not even consider medical treatment. There was no injury of any kind, shape or form. However, the Court of Appeals was persuaded that signs of a two month old child being tired (eye blinking) on one occasion of unspecified duration, without any other sign or symptom, clearly and obviously signaled the onset of seizure disorder for Ashlyn Markovich.

Clearly, the message is that autism is so different than epilepsy that the courts are going to hold parents to a different standard. The standard in *Setnes* was such that the courts did not commence the running of the statute of limitations until there was some correlation by the medical community to the injury being autism while, in the case at hand, the statute of limitations began to run because there was a sign that Ashlyn Markovich was tired.

DR. CORBIER'S OPINION THAT THE EYE BLINKING EPISODE ON JULY 10, 2000 WAS OBJECTIVELY RECOGNIZABLE BY THE MEDICAL PROFESSION AT LARGE AS CONSTITUTING THE FIRST EVIDENCE OF VACCINE INJURY ONSET ONLY BECAUSE OF THE BENEFIT OF HINDSIGHT.

One of the reasons the Court of Appeals held that July 10, 2000 was the date to trigger the running of the statute of limitations was because of the testimony of Dr. Corbier, the Plaintiff's own expert witness. App., *infra*, 16. Again, this issue was addressed by the *Setnes* court under very similar circumstances to the case at hand.

In *Setnes*, the United States contended that Petitioner's own expert, Dr. Marks, stated that the symptoms of autism began to appear within the three-month period following the child's September 11, 1998 vaccination. *Setnes*, 57 Fed. Cl. at 130.

The Special Master relied heavily on Dr. Marks' opinion regarding the symptoms of autism appearing by December 11, 1998. However, the *Setnes* court would not base its decision on Dr. Marks' opinion. The *Setnes* court reasoned that Dr. Marks' opinion was given over two years after the child's official diagnosis, was the product of retroactive evaluation and enjoyed the benefit of hindsight. *Id.* The court further reasoned that Dr. Marks had the fully assembled puzzle in front of him, and when taking the puzzle apart, opined that the pieces he was taking apart must have come from the puzzle. Further, the court reasoned that Dr.

Marks' retroactive diagnosis is plainly inconsistent with the child's contemporaneous medical evaluation. *Id.*

In the case at hand, the Court of Appeals did not accept Petitioners' argument that Dr. Corbier's testimony should be treated the same as the *Setnes* court treated the testimony of Dr. Marks. However, the Court of Appeals concluded that it could accept Dr. Corbier's testimony with the benefit of hindsight because the case at hand did not have contemporaneous medical evaluations as occurred in *Setnes*. The rationale makes no sense. Hindsight is hindsight! The question the court must answer is whether the event of July 10, 2000 would have had any significance in Ashlyn Markovich's life had the seizure not have occurred on August 30, 2000. The event of July 10, 2000, without anything else, was a meaningless event to both the parents (subjective) and the medical community (objective). It is a piece of the puzzle of no significance without the entire puzzle being in place.

Dr. Corbier testified that eye blinking in and of itself was not sufficient to warrant a diagnosis of a seizure disorder. App., *infra*, 114. When asked his opinion if the July 10, 2000 eye blinking episode was in fact a seizure he responded by stating there were one or two possibilities. One was that the eye blinking could have either been some small seizures, subtle seizures if you will, or, two, there was a possibility that it could have been some type of brain dysfunction that started at that time, and manifesting as involuntary eye blinking. The doctor

went on to state that his answers were because of the benefit of hindsight. *Id.* at 115-116.

The standard set by the Court of Appeals is recognizable as a sign of a vaccine injury by the medical profession at large. App., *infra*, 16. Dr. Corbier's testimony certainly cannot be interpreted to conclude that eye blinking is objectively recognizable as a sign of a vaccine injury by the medical profession at large when he stated that "if a child, such as in this case, is just having eye blinking, and the child is otherwise happy and doing well, and not lethargic, it may be hard to -- unless you have a lot of training, it may be hard to even suspect necessarily that these are seizures." App., *infra*, 116.

Again, Dr. Corbier told the Special Master that hindsight was very important in the sense that because the seizures started on August 30 and looking back at the eye blinking episode you are able to relate it to be seizures. *Id.*

Dr. Corbier testified that other than eye blinking the only thing he saw in the review of the medical records as being an indicator that perhaps the event was a predecessor of epilepsy was eye blinking. Dr. Corbier did not see any mention of loss of consciousness or other additional clinical factors. *Id.* at 116-117.

With respect to the medical community at large, Dr. Corbier testified that the episode that occurred on August 30 was evidence of a seizure when he testified that most neurologists and even

general practitioners, including child pediatricians, would have described the event of August 30 as a seizure. *Id.* at 118.

Further, Dr. Corbier testified that without the seizure of August 30 occurring, based on just what happened on July 10, there would have been no conclusion or finding of a seizure disorder. *Id.* at 126.

Finally, linking the eye blinking of July 10 to the seizure disorder of August 30 was benefited by hindsight. Dr. Corbier testified, similar to the puzzle analogy in *Setnes*, that, "just looking back, I think we can look at the big picture and try to put things together." *Id.* at 126-127.

THE LOWER COURT IMPROPERLY CONCLUDED THAT THE MARKOVICHS WERE AWARE THAT ASHLYN MARKOVICH'S EYE BLINKING EPISODE OF JULY 10, 2000 WAS A SEIZURE DISORDER WELL IN ADVANCE OF THE RUNNING OF THE STATUTE OF LIMITATIONS.

The Court of Appeals concluded that the eye blinking episode began promptly after the vaccination and was connected to the injury of seizure disorder within ample time for the Markovichs to have filed a timely claim. App., *infra*, 14. The Court of Appeals referenced a January 29, 2002 report from the Mayo Clinic that the court claimed established that Mrs. Markovich understood that Ashlyn's eye blinking was seizure activity. *Id.* Appendix 91-94 and 95-102 are both reports from the

Mayo Clinic dated January 29, 2002. Those reports are significant for many reasons although establishing knowledge of any injury occurring on July 10, 2000 is not one of them. The January 29, 2002 report of Jeffrey Buchhalter, M.D., states that Ashlyn had no difficulties until first focal onset seizure occurred at four months of age. App., *infra*, 92. The report goes on to state that Ashlyn had a variety of seizures including, but not limited to, eye blinking with or without a head nod lasting seconds that can occur hundreds of times per day. *Id.*

The record in the case at hand mentions a one-time occurrence of eye blinking that occurred on July 10, 2000. Nothing in the record comes close to referencing eye blinking episodes with or without head nods lasting seconds occurring hundreds of times per day as is in the report. App., *infra*, 91-94. Further, there is nothing in the record that this information was actually relayed to Mrs. Markovich nor was there anything in the record that Mrs. Markovich had knowledge or should have had knowledge that the July 10, 2000 episode was what Dr. Buchhalter was referencing in his report of January 29, 2002.

Also, the January 29, 2002 report from the Mayo Clinic prepared by Randa G. Jarra, MBBS, App., *infra*, 95-102, references that Ashlyn was doing well during her first three and a half months of life until August 31, 2000, when she had her "*first seizure*". *Id.* at 96 (emphasis added). Dr. Jarra summarized that Ashlyn was suffering from four types of seizures of which one was repeated eye blinking, either unilateral or bilateral with or

without head nodding lasting for a few seconds and occurring hundreds of times per day. *Id.* at 96-97.

Again, there is no reasonable connection between what occurred on July 10, 2000 and what Ashlyn Markovich was suffering from as of January 29, 2002. The record was void of any reference to anything close to what was referenced in Dr. Jarra's report occurring on July 10, 2000. Also, there is nothing in the record indicating that this information was conveyed to Mrs. Markovich or that Mrs. Markovich made the connection to the event that occurred on July 10, 2000. There is no reasonable basis to conclude that because of the medical records Mr. and Mrs. Markovich were aware or should have been aware that Ashlyn Markovich suffered from an injury of some kind or had a symptom of an injury on July 10, 2000. Further, there is nothing from those medical records to indicate that the medical community at large would have concluded that the episode that occurred on July 10, 2000, without anything more, was evidence of an injury.

Finally, a September 20, 2001 report from Noran Neurological Clinic states that Mrs. Markovich advised the doctor that Ashlyn was having little seizures in the morning and that Mrs. Markovich could tell that Ashlyn was having seizures by looking at her eyes and seeing frequent eye blinking, head rolls to the side and quickly going back to center, shutting her eyes and moaning. App., *infra*, 88. The Court of Appeals concluded that this too was evidence that the Markovichs should have connected the eye blinking episode of July 10,

2000 to the injury of seizure disorder so they could have filed a more timely claim. App., *infra*, 14-16.

However, nowhere in the record was it established that on July 10, 2000, or at any time prior to August 30, 2000, was Ashlyn Markovich having frequent eye blinking, head rolls, shutting her eyes and moaning, etc. Nowhere in the record does it state that Mrs. Markovich made a connection based upon what took place on September 20, 2001 to what took place on July 10, 2000. In fact, the record is clear that what was going on after August 30, 2000 was completely different and not even close to the one meaningless event that occurred on July 10, 2000.

ALTHOUGH THE VACCINE ACT HAS BEEN INTERPRETED TO INCLUDE SUBTLE SYMPTOMS OR MANIFESTATIONS OF ONSET OF THE INJURY WITHIN THE AMBIT OF EVIDENCE THAT TRIGGERS THE RUNNING OF THE STATUTE, ASHLYN MARKOVICH'S JULY 10, 2000 EPISODE CANNOT BE INTERPRETED AS EVEN A "SUBTLE SYMPTOM".

Petitioners are well aware that the Federal Circuit has held that "the statute of limitations...begins to run upon the first symptom or manifestation of the onset of injury, even if the Petitioners reasonably would not have known at that time that the vaccine has caused an injury." *Brice*, 240 F.3d at 1373. *See also*, *Goetz*, 45 Fed. Cl. at 341-42; *Childs v. Sec'y of Health & Human Servs.*, 33 Fed. Cl. 556, 557(n)(2) (1995). However, in each of

these cases, the symptoms or the injury was clearly apparent. In *Childs*, the child suffered a febrile seizure which this court described as follows: "the child became stiff, her eyes deviated to the left, and her left arm shook for a few minutes." *Childs*, 33 Fed. Cl. at 557.

In *Brice*, the child suffered a seizure. *Brice*, 240 F.3d at 1369. In *Goetz*, the court explained that Petitioners' detailed description of the child's immediate post vaccination distress leaves no doubt that Petitioners were aware that their child had suffered an injury following one or more of the vaccinations and that "the symptoms that triggered the running of the statutes were obvious when they occurred and were never hidden..." *Goetz*, 45 Fed. Cl. at 341, 343.

As the *Setnes* court, who referenced all of the three cases, clearly stated, "it is one thing to be unaware that an obvious injury or its onset was caused by a vaccination. It is quite another to lack knowledge, through no assignable fault, of the existence of the onset. This is especially true where the treating physician does not associate the behavior as an onset of an injury." *Setnes*, 57 Fed. Cl. at 181.

THE COURT OF APPEALS' INTERPRETATION OF FIRST SYMPTOM OR MANIFESTATION OF ONSET AS IT APPLIES TO TRIGGERING THE RUNNING OF THE STATUTE OF LIMITATIONS IS CONTRARY TO THE VACCINE ACT'S OWN INTERPRETATION OF FIRST SYMPTOM OR MANIFESTATION OF ONSET AS IT APPLIES TO VACCINE INJURY TABLE CASES.

Mr. and Mrs. Markovich petitioned the United States Court of Federal Claims Office of Special Masters contending that their daughter, Ashlyn Markovich, suffered a seizure disorder and epilepsy caused in fact by the DTaP vaccine that she received on July 10, 2000. Mr. and Mrs. Markovich are not contending that the vaccination of July 10, 2000 caused a Table Injury. However, if presented as a table injury claim, the Markovichs would be able to prevail if they proved that Ashlyn manifested the first symptom of the onset of residual seizure disorder within 72 hours of her July 10, 2000 vaccination. The Court of Appeals has already decided that the eye blinking episode of July 10, 2000 was the first symptom of the residual seizure disorder. Based upon the Court of Appeals' decision, the Markovichs would prevail. However, the law does not support such a finding and, in fact, the Markovichs, based on the July 10, 2000, event would not be able to establish a table injury claim.

Bradley v. Sec'y of Dept. of Health & Human Servs., 991 F.2d 1570 (Fed. Cir. 1993) involved a child who received a DPT vaccination on January 30, 1984. *Id.* at 1571. Over the three days following the

DPT vaccination, the child had a fever of 101-104 degrees, extreme irritability, redness and swelling at the injection site, dropped head syndrome, staring episodes during which she did not react to an external stimuli and fitful sleep. *Id.* In fact, the child's mother was so concerned that she contacted a pediatrician to address the concerns. *Id.*

Ultimately, the child went on to suffer seizure disorder and was suffering from attention deficit disorder, delayed speech, aggressive behavior and head banging. The Special Master ultimately ruled that the Petitioner had "not been able to show the existence of a table injury or causation by a preponderance of the evidence". *Id.* at 1573. The Special Master reasoned that he believed the Petitioner was telling the truth as she remembered events; however, her recollections were not credible and persuasive in certain respects because there were no corroborating, contemporary medical records to support the claim and each expert's testimony conflicted as to the meaning of the events. *Id.*

In the case at hand, had the Markovichs filed a Petition claiming a table injury within 36 months of July 10, 2000, it is doubtful that they would have prevailed with their table injury claim. In the case at hand, the Court of Appeals found that one episode of sleepiness was enough to establish an onset of injury to begin the running of the statute of limitations. However, in *Bradley*, even though there were numerous concerns that were far more serious than Ashlyn Markovich blinking her eyes, the *Bradley* court did not find in favor of a table claim

because it was not based on contemporaneous medical records. *Id.*

In short, to establish an onset of injury to prove a table injury claim seems to require contemporaneous medical documentation while to determine when the statute of limitation commences, the onset of injury is established without any contemporaneous medical records or evidence of any type. Although apparently the same standard, it is being applied differently in both situations.

If the *Bradley* case was a statute of limitations claim such as the Markovichs' case, it is highly likely that the statute of limitations would have been determined to commence shortly after the vaccination. However, if the Markovich facts were substituted for the *Bradley* facts, it is extremely unlikely that a table injury would have been proven in *Bradley*. How can it be that the manifestation of the first symptom of the onset of Ashlyn Markovich's seizure disorder is sufficient to commence the running of the statute of limitations when it would be insufficient to establish a table injury claim that applies the same standard? There is no answer other than the Court of Appeals either misapplied the correct standard or applied the incorrect standard. Regardless, the decision was wrong.

CONCLUSION

The Petition for a Writ a Certiorari should be granted.

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Respectfully Submitted.

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